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No. 88-1807

In The

Supreme Court of the United States

October Term, 1988

WALTER FLETCHER, JR.,

Petitioner,

vs.

ANTHONY O'DONNELL and
CITY OF ALLENTOWN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

1. SHOULD A WRIT OF CERTIORARI BE ISSUED IN THE CASE WHERE THE COURT PROPERLY INSTRUCTED THE JURY ON THE ISSUE OF DAMAGES AND WHERE THERE IS NO CONFLICT BETWEEN DECISIONS OF DIFFERENT FEDERAL COURTS OF APPEALS ON THE SAME MATTER?

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2. *Black v. Stephens*, 662 F.2d 181 (3rd Cir., 1981), cert. denied 102 S. Ct. 1646, 455 U.S. 1008, 71 L. Ed. 2d 876 (1982) 3, 7, 8

3. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed 2d 368 (1973) 5

4. *National Assn. of Greeting Card Pubs. v. USPS*, 462 U.S. 810, 77 L. Ed. 2d 195, 103 S. Ct. 2717 (1963) 6

III. STATEMENT OF THE CASE

The Petitioner, Walter Fletcher, Jr., filed suit in the United States District Court for the Eastern District of Pennsylvania against Anthony O'Donnell, a patrolman employed by the City of Allentown, and the City of Allentown. In Mr. Fletcher's Complaint, he alleged that the Respondent Anthony O'Donnell arrested the Petitioner without cause, used excessive force during that arrest, and filed and procescuted false criminal charges against the Petitioner. Mr. Fletcher further alleged that Respondent City of Allentown had enacted a policy of invidious discrimination and had failed to properly supervise Officer O'Donnell, and was , therefore, liable in damages to the Plaintiff. In November of 1987, the case proceeded to trial. The trial court directed a verdict in favor of Respondent City of Allentown. The jury found that Officer O'Donnell had used excessive force in his arrest of Mr. Fletcher, and awarded Petitioner no compensatory damages and $1,500.00 in punitive damages. The court, realizing that the jury's verdict was inconsistent, reinstructed the jury on the issue of damages. The jury then reached a verdict of $750.00 in compensatory damages and $750.00 in punitive damages. Mr. Fletcher filed post-trial motions. The court denied these motions. The United States Court of Appeals for the Third Circuit affirmed the judgment against Officer O'Donnell, but reversed the directed verdict which had been enterend by the trial court in favor of the City. In its Opinion, the Court of Appeals stated that the amount of these compensatory damages had been decided by the jury's verdict against Officer O'Donnell. The Court of Appeals also stated that punitive damages could not be recovered from

the City, and therefore, the only issue which would be resolved on a remand would be the City's potential liability for the amount of compensatory damages awarded by the jury.

A Petition for Rehearing was then filed by Mr. Fletcher and was denied. Mr. Fletcher has now filed a Petition for a Writ of Certiorari with this Honorable Court. This Petition is now before the Court for its consideration.

IV. SUMMARY OF ARGUMENT

The issue present in the case at bar is whether or not the trial court properly instructed the jury on the issues of damages after the jury initially returned an inconsistent verdict. The trial court properly instructed the jury as the court properly advised the jury as to the various methods which the jury could employ in order to remedy its inconsistent verdict. Furthermore, the trial court advised the jury that it could return the same verdict, if this was the verdict that the members of the jury thought appropriate.

Since this instruction as a whole presented the issues to the jury and advised the jury as to the alternatives which could be used to remedy the inconsistency in its initial verdict, the instruction was proper.

The Petitioner has also alleged that a Writ of Certiorari would be proper in this case, since the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

As support for this allegation, Petitioner cites *Black v. Stephens*, 662 F.2d 181 (3rd Cir., 1981, cert. denied 455 U.S. 1008, 102 S. Ct. 1646), 71 L. Ed. 2d 876 (1982). However, *Black, supra,* is also a decision of the Third Circuit Court of Appeals, and therefore cannot be cited for the proposition that two different Courts of Appeals have rendered conflicting decisions on the same matter. Furthermore, the issue decided in *Black, supra,* and the issue decided by the Court of Appeals in the case at bar are different issues, preventing the two decisions from being conflicting decisions on the same matter.

V. ARGUMENT

A THE JURY INSTRUCTION ON THE ISSUE OF DAMAGES WHICH WAS ISSUED BY THE TRIAL COURT AND REVIEWED BY THE COURT OF APPEALS WAS PROPER AND DID NOT INCORRECTLY SUGGEST AN AMOUNT OF DAMAGES TO THE JURY.

At trial, the jury returned the verdict which stated that the Plaintiff had proven that Officer O'Donnell had used excessive force at the time of his arrest of the Plaintiff and/or at the Allentown Police Station. However, the jury found that the Plaintiff had incurred no compensatory damages as a result of Officer O'Donnell's conduct. However, the jury awarded $1,500.00 in punitive damages. The trial court, recognizing that the jury's verdict was inconsistent and could be grounds for new trial, decided to reinstruct the jury on the issue of damages. The court then instructed the jury as follows:

> All right, members of the jury, we have a problem with your verdict. There is no problem with Questions 1 and 2. The problem with your verdict is that, notice I said in Question 4, state in dollars the amount, if any. In Question 4, you would have the right to insert no dollars or nothing. But you can't do it in Question 3. The reason for that is, you must award something in Question 3 because to find yes in Question 2, you either found excessive force outside of Mr. Be's, or you found excessive force at the Allentown Police Station, or you found both . . . . (N.T. Nov. 13, 1987, p. 8).

The court further instructed the jury as follows:

> Now there's a couple of things that have happened here. You may have evaluated this case as a fifteen hundred dollar case and put nothing in Question 3 and all of the fifteen hundred dollars in Question 4. If that's what you did, you could subtract something from the fifteen hundred, add it in Question 3 and still come out at fifteen hundred. That's possible and whether you do that or not is up to you.
>
> If you thought the fifteen hundred dollars was the right amount for punitive, there's another problem with that. The problem with that is that punitives must, as I told you earlier, must bear a reasonable relationship to the compensatory damages. So if there's no compensatory damages there really can't be much punitive damages.
>
> Now what I think–I don't want to restrict how you handle this in any way, but what I think what you ought to do is determine whether or not it was your collective judgment that the fifteen hundred dollars total was the right verdict. If that was your judgment, then you ought to adjust the fifteen hundred downward and put something in Question 3.
>
> If your thinking was that the fifteen hundred dollars was the right punitive, then you ought to put something in Question 3, some number, that bears a

> relationship to what Mr. Fletcher underwent in this incident through the excessive force that you found by virtue of your yes answer to Question 2, and put appropriate number in there. . . .
>
> So I would like you to go back and consider what I said, revise your numbers appropriately and you may vary the fifteen hundred dollar number downward if you wish, and you may consider an appropriate number to put in number three, if you wish. (N.T. Nov. 13, 1987, pp. 8-9).

The Plaintiff, throughout the various proceedings related to this case, has been alleging that this instruction improperly suggested to the jury that it should round the $1,500 punitive damages award downward, thereby imposing a limit on the amount of damages which could be awarded by the jury. However, this is not the case. First of all, a jury instruction must be viewed in conjunction with the court's entire charge in order to determine whether a new trial is warranted. *Cupp v. Naughten*, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed. 2d 368 (1973). The rule regarding whether or not an instruction is proper has been stated:

> Our function is to determine whether or not the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submits the issue in the case to the jury. *Ayoub v. Spencer*, 550 F.2d 164, 167 (3rd Cir., 1977), cert. denied 432 U.S. 907, 97 S. Ct. 2952, 53 L. Ed. 2d 1079 (1977).

When the above instruction is viewed in this light, we see that the instruction was proper. This is true because as well as mentioning the possiblity that the punitive damages award might be reduced, the court also instructed the jury that they had the authority to decide whether the $1,500 punitive damages award was correct. The court

informed the jury that they had the power to make a compensatory damages award in addition to the $1,500 in punitive damages. Futhermore, the court instructed the jury that they could leave their verdict as it stood, while forewarning the jury that following that course of action would be grounds for a new trial. In short, the court's instruction fairly adequately submitted the issues in the case to the jury and the charge as a whole was proper.

B. CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE, SINCE A FEDERAL COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS ON THE SAME MATTER.

In Petitioner's Petition, it is stated that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. Under U.S. Supreme Court Rule 17, one reason which will be considered when the court decides whether or not to review a decision on a Writ of Certiorari, is whether or not a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. This court has intrepreted this rule to mean that in order for there to be a conflict, two decisions of Courts of Appeals of different circuits must exist. See *Nat. Assn. of Greeting Card Pubs. v. USPS*, 103 S. Ct. 2717, 462 U.S. 10, 77 L.Ed. 2d 195, where this court stated that it had granted certiorari because there were inconsistencies in the holdings of the Second and the District of Columbia Circuits. Petitioner argues that the decision of the Court of Appeals which the jury

rendered is in conflict with another Court of Appeals decision on the same matter, *Black v. Stephens*, 662 F.2d 181 (3rd Cir., 1986) cert. denied 102 S. Ct. 1646, 455 U.S. 1008, 71 L.Ed. 2d 876 (1982), another decision of the Third Circuit Court of Appeals. There can be no conflict between the decisions of any different circuits, since *Black, supra,* and the decision by the Court of Appeals in the case at bar are both decisions of the Court of Appeals from the Third Circuit.

In addition to the fact that the decisions are from the same circuit, the decision of the Court of Appeals for the Third Circuit in the case at bar and the decision in *Black, supra,* are not conflicting decisions on the same matter. In *Black, supra.,* the district court had awarded damages against three different defendants in a civil rights suit. On appeal, the defendants claimed that they were entitled to a new trial because the award of damages against all three defendants was arbitrary and excessive. The appeals court affirmed the jury's award of damages, stating that the verdict was not so excessive as to call for a reversal of the jury's verdict. The court also took note that the jury was properly instructed on the issues relating to compensatory and punitive damages.

Likewise, in the case at bar, the Court of Appeals affirmed the instruction on the issue of damages given by the trial court. However, the issue on appeal in the case at bar was whether the court had improperly suggested to the jury that it should reduce the punitive damage award in order to award some compensatory damages in order to reconcile an inconsistent verdict. The Court of Appeals rejected this argument, stating that as a whole, the court's instructions on the issue of damages given by the trial

court was proper. The issue of whether the jury's award was excessive has not been raised on appeal by either party. Therefore, the Petitioner's allegation that the decision in *Black, supra* and the Court of Appeals' decision in the case at bar are in conflict or relate to the same matter is without foundation. First of all, as previously stated, the issues being considered by the courts in their respective decisions were not the same issue. In one case, the issue was the excessiveness of the damages; in the other case it was whether the court had improperly suggested to the jury that it award a certain amount of damages. Since the issues decided in the respective decisions were not the same issue, the decision cannot be in conflict on the same matter.

Furthermore, both decisions were handed down by the same circuit, and therefore they are not decisions of different Appeals Courts for the purposes of U.S. Supreme Court Rule 17.1(a).

VI. CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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